

**Zenith Roofing Company and Local Union No. 221
of the United Union of Roofers, Waterproofers
and Allied Workers (AFL-CIO). Case 37-CA-
3413**

April 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

Upon a charge filed by Local Union No. 221 of the United Union of Roofers, Waterproofers and Allied Workers (AFL-CIO) (the Union) on November 12, 1993, the General Counsel of the National Labor Relations Board issued a complaint on December 28, 1993, against Zenith Roofing Company (the Respondent) alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On March 29, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On March 31, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Subregion, by letter dated January 19, 1994, notified the Respondent that unless an answer were received within 7 days from the date of the letter, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Hawaii corporation with an office and place of business in Honolulu, Hawaii, has been engaged in the construction in-

dustry in the State of Hawaii. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its operations purchased and received at its Honolulu, Hawaii facility goods valued in excess of \$50,000 from other enterprises located within the State of Hawaii, each of which other enterprises had received these goods directly from points outside the State of Hawaii. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All those employees of the Respondent covered under the terms of the collective-bargaining agreement by and between the Union and Hawaii Roofing Contractors Association effective November 1, 1992 through November 2, 1997, excluding guards and supervisors as defined in the Act.

Since 1987, and at all material times herein, the Union has been the designated exclusive collective-bargaining representative of the unit, and since 1987 the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period of November 1, 1992, through November 2, 1997.

At all times since 1987, the Union, by virtue of Section 9(a) of the Act, has been, and is, the limited exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.¹

At all times material herein, the Respondent has been signatory to a collective-bargaining agreement by and between the Union and the Hawaii Roofing Contractors Association, the most recent effective from November 1, 1992, through November 2, 1997, which contained provisions requiring that Respondent make

¹ The complaint's commerce data and unit description suggest that the Respondent is a construction industry employer subject to the provisions of Sec. 8(f) of the Act. Accordingly, in the absence of an allegation that the bargaining relationship was actually based on 9(a) majority support, we find that the relationship was entered into pursuant to Sec. 8(f), and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992), and *Deboise Contractors Co.*, 308 NLRB 470 fn. 3 (1992) (citing *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988)).

periodic contributions to various trust funds, as follows:

- (i) Section 14, Roofers Local 221 Health and Welfare Fund
- (ii) Section 15, Roofers Local 221 Pension Fund
- (iii) Section 16, Roofers Local 221 Annuity Fund
- (iv) Section 17, Roofers Local 221 Vacation and Holiday Fund
- (v) Section 17(a), Roofers Local 221 Vacation and Holiday Administration Account
- (vi) Section 18, Joint Apprenticeship and Training Fund

Section 19 of the collective-bargaining agreement provides that the Respondent is to pay to the Union liquidated damages of 10 percent for any delinquent payment to the various funds listed above.

Section 4(a) of the collective-bargaining agreement provides that the Respondent is to submit to the Union on a periodic basis union dues and fees that have been deducted from wages pursuant to receipt of proper authorizations from employees.

Commencing in September 1993, and continuing to date, the Respondent has failed and refused to make contributions to the various trust funds described above; failed and refused to pay to the Union the 10-percent liquidated damages for delinquent payments; and failed and refused to remit dues and related monies to the Union.

In addition, since on or about October 13, 1993, the Respondent has failed and refused to make contributions to the various trust funds described above for the period of May through August 1993, as revealed by a union audit, and failed and refused to pay the 10-percent liquidated damages for delinquent payments for delinquent trust fund contributions revealed by the union audit.

Although the subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the conduct described above without prior notice to the Union, without the Union's consent, and without having afforded the Union an opportunity to negotiate and bargain as the limited exclusive representative of the Respondent's employees with respect to such acts and conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees and has thereby engaged in unfair labor practices affecting commerce

within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing since September 1993, and since October 13, 1993, for the period May through August 1993 as revealed by a union audit, to make contractually required contributions to various trust funds, and to pay to the Union the 10-percent liquidated damages for such delinquent fund contributions as required by the agreement, we shall order the Respondent to make all such delinquent contributions to the funds, and to pay the unpaid 10-percent liquidated damages to the Union for such delinquent contributions.² In addition, the Respondent shall be required to make whole the unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by failing since September 1993 to remit to the Union dues and related monies that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations, we shall order the Respondent to remit such withheld dues to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Zenith Roofing Company, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing and refusing to bargain in good faith with Local Union No. 221 of the United Union of Roofers, Waterproofers and Allied Workers (AFL-CIO), as the limited exclusive representative of its employees in the unit described below, by failing and refusing to make contractually required contributions to the various trust funds; failing and refusing to pay to the Union 10-percent liquidated damages for such delinquent payments as required by the agreement; and failing and refusing

²Any additional amounts due the funds shall be determined at compliance in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

to remit to the Union dues and related monies that have been deducted from employees pursuant to valid dues-checkoff authorizations as specified in the agreement:

All those employees of the Respondent covered under the terms of the collective-bargaining agreement by and between the Union and Hawaii Roofing Contractors Association effective November 1, 1992 through November 2, 1997, excluding guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contractually required contributions to the various trust funds that have not been made since September 1993, and since October 13, 1993, for the period May through August 1993 as revealed by a union audit, pay to the Union the 10-percent liquidated damages which have not been paid for such delinquent fund contributions as required by the agreement, and remit to the Union dues and related monies that have been deducted from its unit employees pursuant to valid dues-checkoff authorizations but withheld from the Union since September 1993, with interest, as set forth in the remedy section of this decision.

(b) Make whole the unit employees for any expenses they may have incurred as a result of the Respondent's failure to make contractually required contributions to the various trust funds, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Honolulu, Hawaii, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 1994

William B. Gould IV, Chairman

James M. Stephens, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Local Union No. 221 of the United Union of Roofers, Waterproofers and Allied Workers (AFL-CIO), as the limited exclusive representative of our employees in the unit described below, by failing and refusing to make contractually required contributions to the various trust funds; failing and refusing to pay to the Union 10-percent liquidated damages for such delinquent payments as required by the agreement; and failing and refusing to remit to the Union dues and related monies that have been deducted from employees pursuant to valid dues-checkoff authorizations as specified in the agreement:

All of our employees [of the Respondent] covered under the terms of the collective-bargaining agreement by and between the Union and Hawaii Roofing Contractors Association effective November 1, 1992 through November 2, 1997, excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make all contractually required contributions to the various trust funds that have not been made since September 1993, and since October 13, 1993, for the period May through August 1993 as revealed by a union audit, pay to the Union the 10-percent liquidated damages which have not been paid for such delinquent fund contributions as required by the

agreement, and remit to the Union dues and related monies that have been deducted from the unit employees pursuant to valid dues-checkoff authorizations but withheld from the Union since September 1993, with interest.

WE WILL make whole the unit employees for any expenses they may have incurred as a result of our failure to make contractually required contributions to the various trust funds, with interest.

ZENITH ROOFING COMPANY